Supreme Court, U.S.
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No. _____

In the
Supreme Court of the United States
October Term 2002

SHIRLEY PICO UNTALAN,

Petitioner,

vs.

KAPIOLANI MEDICAL CENTER,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1

In order to resolve a long-standing conflict in and among circuits, is the Seventh Amendment jury trial right so basic and fundamental a constitutional guaranty that when the discretion of the district court is invoked, pursuant to Rule 39(b) of the Federal Rules of Civil Procedure, trial by jury should be granted in the absence of strong and compelling reasons to the contrary, and not denied by a federal district court simply because the failure to make a timely written demand was due merely to inadvertence?

2

Is the Seventh Amendment jury trial right so basic and fundamental a constitutional guaranty in Title VII discrimination actions so as to preclude summary adjudication where all material issues are contested and the employer's motive is in genuine dispute, the resolution of which depends upon the credibility of eye-witnesses whose oral testimony is not yet before the district court?

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1. The Seventh Amendment jury trial right is so basic and fundamental a constitutional guaranty that when the discretion of the district court is invoked, pursuant to Rule 39(b) of the Federal Rules of Civil Procedure, it should be granted in the absence of strong and compelling reasons to the contrary, and not denied by a federal district court simply because the failure to make a timely written demand was due merely to inadvertence.

2. The Seventh Amendment jury trial right is so basic and fundamental a constitutional guaranty in Title VII discrimination actions to preclude summary adjudication where all material issues are contested and the employer's motive is in genuine dispute, the resolution of which depends upon the credibility of eye-witnesses whose oral testimony is not yet before the district court.

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I. JURISDICTIONAL STATEMENT

The jurisdiction of the district court was based upon Sections 2000e, *et seq.* (Civil Rights Act of 1964), and Sections 12101, *et seq.* (Americans with Disabilities Act of 1990), of Title 42 of the United States Code.

This Court has jurisdiction to review this *Petition for a Writ of Certiorari*, timely filed on September 11, 2003, within ninety days of filing of the court of appeals' unpublished Memorandum Opinion on June 13, 2003, pursuant to Section 1254(1) of Title 28 of the United States Code and Supreme Court Rules 10(c) and 13(3).

II. AUTHORITATIVE PROVISIONS

The court of appeals' unreported decision being challenged is set forth in the Appendix to this Petition, together with the district court's order and judgment, and the relevant constitutional and statutory provisions are footnoted in the text of this Petition.

III. STATEMENT OF THE CASE

On September 16, 1999, and later on April 19, 2000, Petitioner ("Untalan") filed two separate Title VII discrimination complaints *pro se* against Respondent ("Kapiolani"), the first alleging harassment and verbal assault by her supervisors in retaliation for her having filed union grievances based on her national origin and her disability, and the second alleging wrongful termination as a result of that wrongful retaliation based on the same grounds.

The two cases were consolidated on August 17, 2000, after Untalan secured counsel in the first case on May 18, 2000, and in the second case on July 17, 2000.

Untalan, of Filipino descent, had worked at Kapiolani since 1979, first as a nursing assistant, then as an obstetrics technician, and throughout her first eighteen years on the job had always received excellent performance evaluation reports, and had she not been terminated as of July 1999, she would have shortly thereafter been entitled to vested

retirement pension benefits at Kapiolani.

However, beginning in 1997, Untalan began to be ordered to leave work, allegedly because the patient count was low. She protested and eventually filed grievances with her union alleging discrimination, believing that she and other obstetrics technicians were being sent home so that their work could be done by non-union licensed practical nurses, which grievances were not well received by her supervisors at Kapiolani.

Then, on November 27, 1998, after completing a long and difficult C-section procedure in which she assisted, Untalan was confronted by her supervisor, accused on not responding to her pages and not completing an assigned task of opening boxes of gowns. Untalan became upset, filed a worker's compensation claim for stress, and went on leave.

While Untalan was on leave, Kapiolani conducted an investigation, concluding that Untalan had been insubordinate and disruptive, and on January 11, 1999, Kapiolani offered Untalan either termination or a six-month leave of absence conditioned on her undertaking psychiatric treatment and being allowed to return to work only upon being cleared by two psychiatrists or psychologists of Kapiolani's choosing.

Feeling threatened, Untalan believed at first that she had no other choice than to accept a six-month leave of absence; however the following month she filed a discrimination claim with the Hawaii Civil Rights Commission and with the Equal Employment Opportunity Commission, alleging she was forced to choose between a leave of absence or a termination due to her national origin and in retaliation for her unresolved union grievance filings.

In July 1999 Untalan was terminated, Kapiolani alleging that she had not complied with the conditions of her leave of absence, whereupon Untalan filed further discrimination charges with the same government agencies, claiming that her termination was really in retaliation for her earlier filings with the union and later with those government

agencies, now including a charge of disability discrimination.

Untalan did not file jury trial demands initially when, *pro se*, she filed her two lawsuits in district court.

Upon retaining counsel, her counsel -- newly appearing at a Rule 16 scheduling conference held on September 12, 2000, at which time trial by Magistrate was agreed to -- raised the issue of a jury trial for the first time.

Thereafter, after what appeared to be promising settlement negotiations with Kapiolani's counsel, which later proved unfruitful, Untalan's counsel, upon the commencement of discovery in the consolidated cases, filed a motion for trial by jury on November 22, 2000, immediately after returning from an out-of-town trip, as set forth in his December 18, 2000, moving declaration filed in district court.

In response, Kapiolani filed a motion for summary judgment.

Both motions were heard by the district court on December 27, 2000, which denied Untalan's motion for trial by jury as untimely.

The district court refused to exercise its discretion pursuant to Rule 39(b) of the Federal Rules of Civil Procedure, which Rule allows trial by jury where "notwithstanding the failure of a party to demand a jury in an action in which such a demand might have been made of right, the court in its discretion upon motion may order a trial by a jury of any or all issues," finding that a "mere inadvertence" does not permit it to exercise such discretion.

The district court then proceeded, as trier of fact, to grant summary judgment in favor of Kapiolani on all claims of discrimination, finding that there was no factual "prima facie" basis for any of Untalan's claims which it concluded were "implausible" and based upon "unreasonable inferences of fact" -- mainly "in light of Plaintiff's undisputed history of disciplinary problems," according to Kapiolani.

Untalan appealed. The court of appeals affirmed.

IV. LEGAL ARGUMENT

This Petition is based upon two legal arguments, *first*, that the court of appeals erred when it affirmed the district court's determination that "mere inadvertence" as a matter of law cannot be grounds for a district court exercising its discretion belatedly to grant a jury trial, and, *second*, that the court of appeals erred when it affirmed the district court's determination that it could deny Title VII relief through summary adjudication where all material issues were contested and remained in genuine dispute, the resolution of which depended upon the credibility of eye-witnesses whose oral testimony was not before the district court.

Point One

The Seventh Amendment jury trial right is so basic and fundamental a constitutional guaranty that when the discretion of the district court is invoked, pursuant to Rule 39(b) of the Federal Rules of Civil Procedure, it should be granted in the absence of strong and compelling reasons to the contrary, and not denied by a federal district court simply because the failure to make a timely written demand was due merely to inadvertence.

The Seventh Amendment to the United States Constitution declares that "in Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

Rule 38(a) of the Federal Rules of Civil Procedure seeks to recognize and to preserve that jury trial guaranty, while placing time limitations upon its exercise, "not later than 10 days after the service of the last pleading directed to such issue," whereas Rule 39(b) of the Federal Rules of Civil Procedure provides that "notwithstanding the failure of a party to demand a trial in an action in which such a demand might have been made of right, the court in its discretion

upon motion may order a trial by a jury of any or all issues."

Not surprisingly, there have been sharp differences of opinion and considerable disagreement among circuit courts of appeals, and among district courts in the same circuit, as to how such discretion should be exercised, which has in the past fifty years led to increasing conflicts among the circuits, yet each time review has been sought in this Court this Court has refused review.

This conflict among the circuits has now reached a constitutional boiling point, as it were, for whether parties pursuant to Rule 39(b) are allowed in the federal system to belatedly secure a jury trial now depends upon which circuit one's case is in (or even which district court within which circuit one's case is in) – a surprising lack of uniformity in so important an area of federal constitutional law.

And there is no more serious a division among circuits on that Rule 39(b) discretionary issue over the question whether "mere inadvertence" should automatically result in a denial of Rule 39(b) relief – which the Untalan case clearly illustrates – and which split among the circuits makes her case on that issue especially ripe for review.

The ninth circuit, for instance, has led the way in taking a highly narrow and restrictive view of Rule 39(b) relief, definitively as here refusing jury trials because of mere oversight, joined by the second, eighth, and tenth circuits -- whereas the first, seventh, and eighth circuits have increasingly adhered to a judicial policy of maintaining an open mind to the factual situations of particular cases, specifically refusing to deny relief solely when faced with claims of mere oversight – while the sixth and eleventh circuits have from time to time espoused both approaches.

Meanwhile, the district courts within each of these circuits are themselves confusingly rendering contradictory Rule 39(b) opinions; *see, e.g.*, cases collected in Wright &

Miller, Federal Practice and Procedure, *Federal Rules of Civil Procedure, Rule 39*, Section 2334.

This entire body of constitutional law in this area is today in complete shambles:

Compare, for example:

FIRST CIRCUIT: "discretion under Rule 39(b) is very broad . . . ; it is certainly not an abuse of discretion for a district court to grant a Rule 39(b) motion to a pro se plaintiff on the basis of mere inadvertence . . . ; counsel had been under mistaken impression that Rowlett had requested a jury trial when proceeding pro se. . . ; the trial was not delayed or extended, nor was there any unfair surprise" Rowlett v. Anheuser-Busch, Inc., 832 F.2d 194, 200 (1st Cir. 1987).

SECOND CIRCUIT: "mere inadvertence in failing to make a timely jury demand does not warrant a favorable exercise of discretion under Rule 39(b) . . . ; the area open to the judge's discretion has shrunk to determining whether the moving party's showing *beyond* mere inadvertence is sufficient to justify relief," Noonan v. Cunard Steamship Co., 375 F.2d 69 (1967); but see Raymond v. IBM, 148 F.3d 63, 65-67 (2nd Cir. 1998), which, while reaffirming Noonan, comes to a completely opposite result by inconsistently invoking Rule 6(b)(2) of the Federal Rules of Civil Procedure to overcome any restrictions on Rule 39(b), granting Rule 6(b)(2) "extensions" of time instead.

FIFTH CIRCUIT: "when the discretion of the court is invoked under Rule 39(b), the court should grant a jury trial in the absence of strong and compelling reasons to the contrary," Swofford v. B & W, Inc., 336 F.2d 406, 409 (5th Cir. 1964), *cert. denied*, 379 U.S. 962 (1965); see Daniel International Corp. v. Fischbach & Moore, Inc., 916 F.2d 1061, 1064 (5th Cir. 1990), reaffirming Swofford, and adopting the five-factor test utilized by the eleventh circuit in Parrott v. Wilson, *infra*, 707 F.2d 1262, 1276 (11th Cir.),

cert. denied, 464 U.S. 936 (1983).

SIXTH CIRCUIT: "the court's discretion should be exercised in favor of granting a jury trial where there are no compelling reasons to the contrary" pursuant to Rule 39(b), "given the broad grant of discretion under Rule 39(b), the lack of precedent for reversing the grant of a jury trial, and the appellant's failure to convincingly show discernible prejudice," Moody v. Pepsi-Cola Metropolitan Bottling Co., Inc., 915 F.2d 201, 207 (6th Cir. 1990); but see Kitchen v. Chippewa Valley Schools, 825 F.2d 1004, 1013 (6th Cir. 1987) ("generally, a district court does not abuse its discretion by denying a 39(b) motion if the only justification for delay is 'mere inadvertence,'" distinguishing, illogically, between affirming the granting, as opposed to the denial, of a belated jury trial request).

SEVENTH CIRCUIT: "Rule 39(b) grants wide discretion to the federal courts in considering untimely jury demands. . . . A jury trial is not a minor feature of our judicial system. The right of a litigant to have his fellow citizens hear and weigh the evidence is a hallmark of our jurisprudential system. . . . In the absence of strong and compelling reasons to the contrary, untimely jury trial demands should be granted. . . . The mere fact, however, that plaintiff's motion for a jury trial was 'too late' is neither a strong nor a compelling reason to deny the fundamental right to a jury trial," Merritt v. Faulkner, 697 F.2d 761, 767 (7th Cir.), *cert. denied*, 464 U.S. 986 (1983); see also Kotsilieris Chalmers, 966 F.2d 1181, 1187 (7th Cir. 1992), reaffirming Merritt ("courts closely guard a party's interest in proceeding to a trial by jury, meaning that untimely jury trial requests should be allowed absent strong and compelling reasons to the contrary").

EIGHTH CIRCUIT: "here the corporate parties offered no justification for their failure to timely demand a jury trial [except inadvertence] . . . ; we hold that the district

court did not abuse its discretion in denying the corporate parties a jury trial," Shelton v. Consumer Products Safety Commission, 277 F.3d 998, 1011-1012 (8th Cir. 2002).

NINTH CIRCUIT: "a district court's discretion under Rule 39(b) 'is narrow . . . and does not permit a court to grant relief when the failure to make a timely jury trial demand results from an oversight or inadvertence,'" Craig v. Atlantic Richfield Co., 19 F.3d 472, 477 (9th Cir. 1994), quoting from Lewis v. Time, Inc., 710 F.2d 549, 556 (9th Cir. 1983); see also Zivkovic v. Southern California Edison Co., 302 F.3d 1080, 1087 (9th Cir. 2002) ("Zivkovic's good faith mistake as to the deadline for demanding a jury trial establishes no more than inadvertence, which is not a sufficient basis to grant relief from an untimely jury demand"); but see, *e.g.*, the revolt taking place among district courts (except in Hawaii) in the ninth circuit rejecting the harshness of the Craig rule, as in Johnson v. Dalton, 57 F. Supp. 2d 958, 960 (D.C. C.D. Calif. 1999), that ninth circuit district court, while acknowledging Lewis, *supra*, for instance, holding that inadvertence is not enough, preferred instead "the plain language of Rule 39(b)," adopting the Rule 6(b)(2) alternative analysis found in the second circuit Raymond decision, *supra*, intentionally ignoring the very ninth circuit court of appeals precedent that denied Untalan a jury trial here, preferring instead the five-factor eleventh circuit test found in Parrott, *infra*: "Despite suggestions in Ninth Circuit opinions that the Court does not have discretion in this case, the Court finds that the Rule itself, case law, and policy support the court's exercise of discretion here."

TENTH CIRCUIT: "Plaintiff has made no attempt to demonstrate that his untimely jury demand was due to anything other than inadvertence or oversight. Accordingly, we conclude that the district court's denial of the Rule 39(b) motion was not an abuse of discretion," Dill v. City of

Edmond, Oklahoma, 155 F.3d 1193, 1208 (10th Cir. 1998).

ELEVENTH CIRCUIT: "in this circuit, the general rule governing belated jury requests under Rule 39(b) is that the trial court 'should grant a jury trial in the absence of strong and compelling reasons to the contrary," Parrott v. Wilson, 707 F.2d 1262, 1267 (11th Cir.), *cert. denied*, 464 U.S. 936 (1983), quoting from Swofford, *supra*, adopting that fifth circuit approach, and setting forth a five-factor test for determining "(1) whether the case involves issues which are best tried to a jury; (2) whether granting the motion would result in a disruption of the court's schedule or that of the adverse party; (3) the degree of prejudice to the adverse party; (4) the length of the delay in having requested a jury trial; and (5) the reason for the movant's tardiness in requesting a jury trial," while nevertheless inconsistently at the same time embracing a narrow view of Rule 39(b), contrary to the practice of the circuits, *supra*, that have adopted its five-factor test: "although the normal practice in the district court is to balance all of the factors enumerated above, when reviewing a lower court's denial of a belated jury trial request . . . , if that failure is due to mere inadvertence on the movant's part, we generally will not reverse the trial court's refusal to grant a 39(b) motion."

Such lack of uniformity and oversight of this important area of so fundamental a constitutional right by this Court for one-half century, accentuated by this Court's parade of *certiorari* denials, has meant that whether individuals such as Untalan are granted a trial by jury or not depends not only upon what circuit one's case is in, but even upon which district court in which circuit one's case is in.

The Seventh Amendment constitutional right to trial by jury needs urgently to be rescued from such an amorphously capricious discretionary jurisdictional quagmire.

Point Two

The Seventh Amendment jury trial right is so basic and fundamental a constitutional guaranty in Title VII discrimination actions to preclude summary adjudication where all material issues are contested and the employer's motive is in genuine dispute, the resolution of which depends upon the credibility of eye-witnesses whose oral testimony is not yet before the district court.

Untalan alleges that her hostile work environment and eventually her job termination were the result of her employer's discrimination against her based upon her place of national origin, her acquired job-related stress disability, and her grievance complaints lodged against Kapiolani.

Before the district court Untalan established a *prima facie* case regarding her employer's discriminatory and retaliatory motives, based upon her prior excellent job performance ratings, her employer's hiring of non-union substitutes, and her employer's trumped-up charges against her – all of which led to her firing in retaliation.

While her employer denied her charges through the presentation to the district court of self-serving statements of several of its paid personnel, the principal issue in such cases concerning the employer's motive remained in genuine dispute throughout all of the proceedings below.

Yet the district court, symptomatic of its abrupt denial of Untalan's motion for jury trial, in its order granting Kapiolani summary judgment on all issues, assumed as true nearly everything that Kapiolani alleged, including "Plaintiff's insubordinate behavior" and Plaintiff's alleged "undisputed history of disciplinary problems," and assumed as false almost everything that Untalan to the contrary testified about in her responsive papers, except the district court had to concede that as to the existence of her disability summary judgment could not be granted, yet granted

summary judgment anyway due to her "insubordination."

The district court's view of the facts before it was clearly one-sided and unjustified in light of Title VII requirements and the applicable case law both nationally and in its own jurisdiction.

A *prima facie* case of disparate treatment, for instance, requires nothing more than circumstantial evidence of an employer's "discriminatory motive," Lowe v. City of Monrovia, 775 F.2d 998, 1009 (9th Cir. 1985).

The degree of proof needed, moreover, to support an inference of discrimination, as an alternative means of establishing one's *prima facie* case, is "very little" in order "to raise a genuine issue of fact regarding employer's motive; any indication of discriminatory motive . . . may suffice to raise a question that can only be resolved by a fact-finder" at trial, *ibid.*

Similarly, one need not show, as the district court mistakenly concluded, that Untalan had the initial burden of proving that others of her national origin were similarly discriminated against, for it is sufficient to allege "that an individual was singled out and treated less favorably than others similarly situated on account of race or other criterion impermissible under the statute (Title VII)" in the ninth circuit, Gay v. Waiters' and Dairy Lunchmen's Union, 694 F.2d 531, 537 (9th Cir. 1982).

Nevertheless, the record shows that Untalan was not the only obstetric technician of Filipino ancestry who filed union grievances at the same time that she did; moreover, the record also shows that Untalan was receiving less work and less pay than Caucasian workers doing the same job as she was at Kapiolani.

As for the requisite degree of proof required initially of Untalan in order to establish her *prima facie* case, the "requisite degree of proof" in the ninth circuit is "minimal and does not even need to rise to the level of a preponderance of evidence," Wallis v. J. R. Simplot Co., 26 F.3d 885, 889

(9th Cir. 1994).

What happened below is not how the burden of proof is supposed to operate in Title VII cases, especially in pretrial proceedings.

While the ultimate "burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff," the plaintiff nevertheless has only an initial burden of proof requiring the plaintiff to establish a *prima facie* case only of Title VII discrimination, after which the burden of going forward with the evidence shifts to the defendant, Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981).

"The burden of establishing a prima facie case," for example, "of disparate treatment is not onerous," *id.* at 253. All that a plaintiff must prove is that he or she was qualified for the position, "but was rejected under circumstances that give rise to an inference of unlawful discrimination," *ibid.* See also International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

Moreover, summary adjudication is generally considered in the ninth circuit to be unsuitable in Title VII cases because "intentional discrimination" is an "elusive factual question," Burdine, 450 U.S. at 255 n.8; Yartzoff v. Thomas, 809 F.2d 1371, 1377 (9th Cir. 1987).

"An employer's true motive in an employment decision is rarely easy to discern" and "without a searching inquiry into these motives, those [acting for impermissible motives] could easily mask their behavior behind a complex web of *post hoc* rationalizations," Peacock v. DuVal, 694 F.2d 644, 646 (9th Cir. 1982).

Summary judgment is considered to be still further unsuitable in cases such as this "involving issues of motivation or intent," Douglas v. Anderson, 656 F.2d 528, 535 (9th Cir. 1981), especially in the absence of an evidentiary hearing where the trier of fact can make "credibility assessments" and "weigh conflicting evidence,"

Bator v. Hawaii, 39 F.3d 1021, 1026 (9th Cir. 1994).

Having wrongfully denied Untalan trial by jury, the district court took it upon itself to decide the case by summary adjudication, despite the fact that Untalan had made a prima facie showing of discrimination and despite the fact that virtually all material issues in the case were genuinely disputed by Untalan – below and to this day.

V. CONCLUSION

For all of the above reasons, Petitioner prays that this Court will grant review, reverse, and remand, announcing meaningful Rule 39(b) instructions for our district and circuit courts that will promote long overdue uniformity in this important, yet highly neglected, area of American constitutional law.

Respectfully submitted,

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Counsel for Petitioner
Shirley Pico Untalan

Honolulu, Hawaii
September 11, 2003

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I. Order Denying Plaintiff's Motion For Trial By Jury; Order Granting Defendant's Motion For Summary Judgment, Civil Nos. 99-00635 LEK and 00-00293 LEK, filed April 4, 2001 (U.S. District Court for the District of Hawaii) A1

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I. Order Denying Plaintiff's Motion For Trial By Jury; Order Granting Defendant's Motion For Summary Judgment, Civil Nos. 99-00635 LEK and 00-00293 LEK, filed April 4, 2001 (U.S. District Court for the District of Hawaii)

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

SHIRLEY PICO UNTALAN,	)	CV. NO. 99-00635 LEK
	)	CV. NO. 00-00293 LEK
Plaintiff,	)	
vs.	)	
	)	
KAPIOLANI MEDICAL CENTER,	)	
	)	*FILED APRIL 4, 2001*
Defendant.	)	
	)	

ORDER DENYING PLAINTIFF'S MOTION FOR TRIAL BY JURY; ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Plaintiff Shirley Pica Untalan ("Plaintiff") filed the instant consolidated employment discrimination action against Defendant Kapi'olani Medical Center for Women and Children ("Kapiolani") alleging, among other things, national origin and ancestry discrimination, disability discrimination, and retaliation, as well as pendent state claims for negligent and/or intentional infliction of emotional distress. Pursuant to the consent of the parties and District Judge Helen Gillmor's Order of Reference, filed September 20, 2000, the consolidated action was assigned to this Court. On November 22, 2000, Plaintiff filed her Motion for Trial by

Jury. On the same date, Kapiolani filed its Motion for Summary Judgment on all claims. Both matters came on for hearing on December 27, 2000. Ronald T. Fujiwara appeared for Plaintiff; Sarah O. Wang appeared for Defendant. After careful consideration of the motions, supporting and opposing memoranda, and arguments of counsel, and for the reasons set forth below, this Court DENIES Plaintiff's Motion for Trial by Jury and GRANTS Kapiolani's Motion for Summary Judgment in its entirety.

BACKGROUND

This action arises out of Plaintiff's termination from her position as an Obstetrics Technician ("OB Tech") at Kapiolani's Labor and Delivery Unit, later renamed the Family Birth Center. As an OB Tech, Plaintiff was a member of the Hawaii Teamsters and Allied Workers, Local 996, IBT (the "Union") and was subject to the terms of the collective bargaining agreement ("CBA") between Kapiolani and the Union. The parties have stipulated to the claims at issue in this action:

1) Discrimination on the basis of national origin, ancestry and disability, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq. ("Title VII") and the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 et seq.("ADA");

2) Retaliation, based on (1) a "class action" union grievance that charged national origin/ancestry discrimination against Kapiolani, and (2) Plaintiff's filing of a discrimination charge, all in violation of Title VII and the ADA;

3) Intentional infliction of emotional distress ("IIED") under Hawaii law;

4) Negligent infliction of emotional distress ("NIED") under Hawaii law; and

5) Violation of privacy rights pursuant to Article I, Section 6, Hawaii State Constitution, based on Kapiolani's reliance upon medical and criminal records of Plaintiff in terminating her.

Plaintiff was terminated following an investigation of an incident which occurred on November 27, 1998. On that date, Plaintiff's supervisor, Christine Turner, confronted Plaintiff regarding her failure to open boxes of gowns in all the patient rooms, as Turner had requested earlier. Investigation of the incident revealed that Plaintiff had yelled at Turner, stormed out of the area, violently flung open a door and ultimately failed to complete the requested task. Employees who were interviewed during the investigation reported that Plaintiff had recently started acting unusually angrily and unpredictably, including telling other employees that she had access to guns and/or that she wanted to "kill the LPNs." Several employees stated that they were afraid to be around Plaintiff and feared for their safety.

Plaintiff's conduct violated Kapiolani's House Rules regarding insubordination and threats of violence, and Kapiolani management agreed that Plaintiff's conduct warranted termination. Management felt, however, that outright termination posed a risk of violence, and in lieu of immediate termination, and in recognition of Plaintiff's long-term employment (since approximately 1979 or 1980), Kapiolani offered Plaintiff a conditional six-month leave of absence. As conditions of the leave of absence, Plaintiff was required to: 1) continue treatment with her personal providers and provide Kapiolani with confirmation of the same; 2) receive clearance to return to work from two psychiatrists and/or psychologists chosen by Kapiolani; and

3) remain off Kapiolani premises.

Although Plaintiff initially accepted the leave of absence, Plaintiff ultimately declined to accept the same. Instead, in late January 1999, Plaintiff filed an unfair labor practice charge with the National Labor Relations Board (the "NLRB"). The NLRB dismissed the charge finding "no cause," and further denied Plaintiff's appeal of the dismissal.

In Februŭary 1999, Plaintiff filed a discrimination claim with the Hawaii Civil Rights Commission (the "HCRC") and the Equal Employment Opportunity Commission (the "EEOC") alleging that she was being required to choose between a six-month leave of absence and termination based on her national origin, and in retaliation for her prior filing of a Union grievance.[1]

Plaintiff's charges were dismissed for "no cause," and her subsequent appeals were dismissed. Based on the EEOC's Dismissal and Notice of Rights, Plaintiff timely filed her first lawsuit against Kapiolani, Civil No. 99-00635.

On approximately July 7, 1999, at a joint meeting with Plaintiff, the Union and Kapiolani, Plaintiff was terminated because she had not complied with the conditions of the leave of absence. The Union filed a grievance as to

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[1] In October of 1997, Plaintiff complained to her Union representative regarding OB Techs being sent home and their work being done by non-bargaining unit LPNs. Kapiolani stated that OB Techs were being sent home due to low patient count. Nonetheless, Plaintiff felt the practice was unfair and in violation of the CBA. The Union filed a grievance to protest the same.

Plaintiff's termination. The grievance was arbitrated in February 2000, and was denied.

As a result of her termination, Plaintiff filed another unfair labor practice charge with the NLRB, as well as discrimination charges with the HCRC and the EEOC. Plaintiff alleged termination in retaliation for activities protected by the National Labor Relations Act ("NLRA"); namely, for filing her prior HCRC charge. Plaintiff later amended the HCRC charge to include a charge of disability discrimination. The NLRB dismissed the charge in part and deferred in part to the grievance arbitration. Plaintiff's appeal of the same was denied. Similarly, Plaintiff's HCRC and EEOC claims were dismissed for "no cause," and her subsequent appeal was denied. Based on the EEOC's Dismissal and Notice of Rights, Plaintiff filed her second lawsuit against Kapiolani, Civil No. 00-00293. On August 17, 2000, Plaintiff's two actions were consolidated.

DISCUSSION

I. Motion for Trial by Jury

Pursuant to Federal Rule of Civil Procedure 39(b), Plaintiff seeks to amend her complaints to demand a jury trial. Rule 39(b) states in relevant part:

> [N]otwithstanding the failure of a party to demand a jury in an action in which such a demand might have been made of right, the court in its discretion upon motion may order a trial by a jury of any or all issues.

Fed. R. Civ. P. 39(b).

Accordingly, under Rule 39(b) the district court, in its

discretion, may order a jury trial on a motion by a party who has not filed a timely demand for one. See id. The Ninth Circuit has held, however, that that discretion is narrow, and courts have generally denied untimely requests for jury trials, "unless some cause beyond mere inadvertence is shown." Mardesich v. Marciel, 538 F.2d 848, 849 (9th Cir. 1976) (per curiam) (citation omitted); see also Craig v. Atlantic Richfield Co., 19 F.3d 472, 477 (9th Cir. 1994); Chandler Supply Co. v. GAF Corp., 650 F.2d 983, 987 (9th Cir. 1980).

Plaintiff's demand for a jury trial now comes at least seven months after "service of the last pleading"[1] and at least seven months after Plaintiff's counsel entered his appearance in the case. Plaintiff gives no reason for her failure to make a timely demand, other than that she filed her complaints pro se and on that basis should be given greater leniency. Plaintiff's argument is without merit. While it is true that pro se litigants are held to less stringent standards than those of their legal counterparts, see Haines v. Kerner, 404 U.S. 519 (1972); Fischer v. Cahill, 474 F.2d 991 (3d Cir. 1973) Plaintiff's pro se status cannot excuse her from complying with the procedural or substantive rules of the court. See Engle v. United States., 736 F. Supp. 670, 671-72 (D. Md. 1989). Moreover, Plaintiff has been represented by counsel since as early as May 18, 2000, in her first case, and since July 17, 2000, in her second case. Plaintiff has had numerous

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[1] Rule 38 of the Federal Rules of Civil Procedure provides that any party demanding a jury trial must: 1) serve upon the other party a demand in writing any time after the commencement of the action and not later than ten (10) days after the service of the last pleading direct [sic] to such issue; and 2) file the demand as required by Rule 5(d). See Fed. R. Civ. P. 38(b).

occasions during those five to seven months to demand a jury trial. The Court concludes therefore that Plaintiff's failure to timely demand a jury trial is based on "oversight, inadvertence, and [/or] inexcusable neglect." Craig, 19 F.3d at 477. Having failed to timely request a jury trial, therefore, Plaintiff is precluded from doing so now. The law is clear that the failure of a party to serve and file a timely demand for a jury trial constitutes a waiver of the right to trial by jury. See Fed. R. Civ. P. 38(d); Favors v. Coughlin, 877 F.2d 219, 220 (2d Cir. 1989). Accordingly, Plaintiff's Motion for Trial by Jury is DENIED.

II. Motion for Summary Judgment

A. Standard of Review

> Summary judgment shall be entered when:
>
> the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Fed. R. Civ. P. 56(c) . The standard for a grant of summary judgment reflects the standard governing the grant of a directed verdict. See Eisenberg v. Insurance Co. of N. Am., 815 F.2d 1285, 1288 (9th Cir. 1987) . The question is whether "reasonable minds could differ as to the import of the evidence." Id. "When a mixed question of fact and law involves undisputed underlying facts, summary judgment may be appropriate." See Han v. Mobil Oil Corp., 73 F.3d 872 (9th Cir. 1995) (citing Union Sch. Dist. v. Smith, 15 F.3d 1519, 152.3 (9th Cir.), cert. denied, 513 U.S. 965 (1994)).

The burden initially lies with the moving party to

identify for the court "those portions of the materials on file that it believes demonstrate the absence of any genuine issue of material fact." T.W. Elec. Serv. Inc. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986)). "If the factual context makes the nonmoving party's claim implausible, that party must come forward with more persuasive evidence than would otherwise be necessary to show that there is a genuine issue for trial." California Architectural Bldg. Prods., Inc. v. Franciscan Ceramics, Inc., 818 F.2d 1466, 1468 (9th Cir. 1987), cert. denied, 484 U.S. 1006 (1988) (citing Matsushita Elec. Indus. Co. v.. Zenith Radio Corp., 475 U.S. 574, 587 (1986)) (emphasis in original).

B. Discrimination Under Title VII

Title VII of the Civil Rights Act makes it unlawful for "an employer . . . to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a) (1). A plaintiff may show a violation of this statute by proving disparate treatment or disparate impact. See Sischo-Nownejad v. Merced Cmty. Coll. Dist., 934 F.2d 1104, 1109 (9th Cir. 1991) . A disparate treatment claim, at issue in the instant case, is based on intentional employer discrimination. See id. A prima facie case of intentional discrimination based on national origin "may be based either on a presumption arising from the factors such as those set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 93 S. Ct. 1817, 1824, 36 L.Ed.2d 668 (1973), or by more direct evidence of discriminatory intent." Wallis v. J.R. Simplot Co., 26 F.3d 885, 889 (9th Cir. 1994). In order to make out a prima facie case, a plaintiff must show: (a) membership in a protected

class; (b) that she was performing her job in a satisfactory manner; (c) that an adverse employment decision was made against her; and (d) that she was replaced by an individual of a different national origin or her employer treated individuals of a different national origin more favorably than it treated her. See Solorzano v. Shell Chem. Co., No. Civ. A. 99-2831, 2000 WL 1252555, at *5 (E.D. La. Aug. 31, 2000).

After the plaintiff has established a prima facie case, the burden of production shifts to the employer to articulate a legitimate, non-discriminatory reason for its adverse actions. See Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981) . If an employer is able to articulate legitimate non-discriminatory reasons for its actions, the burden then shifts back to the plaintiff to show, by a preponderance of the evidence, that the reasons put forth by the defendant are merely pretextual for true discriminatory intent. See McDonnell Douglas, 411 U.S. at 804; see also Lowe v. City of Monrovia, 775 F.2d 998, 1008 (9th Cir. 1985), amended by, 784 F.2d 1407 (1986).

At the outset, it is clear that Plaintiff cannot establish a claim for ancestry discrimination. As Kapiolani points out, Title VII prohibits discrimination only on the basis of "race, color, religion, sex, or national origin." See 4.2 U.S.C. § 2000e-.2. "Ancestry" is not a protected class under Title VII. There is no basis, therefore, for Plaintiff's ancestry discrimination claim and it fails as a matter of law.

Plaintiff also claims that Kapiolani discriminated against her on the basis of her national origin -- Filipino -- when she was required to take a leave of absence, and ultimately terminated. Plaintiff fails, however, to establish even a prima facie case of discrimination here. Plaintiff's papers are completely devoid of any evidence that Kapiolani treated individuals of a different national origin more favorably than

it treated Plaintiff, or any other Filipinos for that matter. Instead, Plaintiff seems to claim that because she was treated "differently" from other non-Filipino LPNs and because the supervisors who initiated the adverse employment action against Plaintiff were non-Filipinos, this constitutes, by inference, intentional discrimination.

While it is true that inferences may be drawn, such inferences may only be made if they are reasonable in light of the other undisputed background or contextual facts. See T.W. Elec., 809 F.2d at 631-32. If the factual context makes the claim implausible, however, the plaintiff must come forward with more persuasive evidence than otherwise necessary to show there is a genuine issue for trial. See Bator v. State of Hawaii, 39 F.3d 1021, 1026 (9th Cir. 1994) . Here, Plaintiff does not identify any similarly situated non-Filipino employees who were treated more favorably than she was, nor does she provide any evidence of other Filipino OB Techs that were discriminated against. On the contrary, the evidence seems to indicate that Kapiolani regularly employs and continues to hire numerous individuals of Filipino national origin. Under the circumstances, and especially given Plaintiff's insubordinate behavior, Plaintiff's claim of national origin discrimination is implausible. The inferences Plaintiff asks this Court to make are unreasonable in light of Plaintiff's undisputed history of disciplinary problems.

Moreover, as Kapiolani points out, Plaintiff seems to be arguing that she is being "singled out," even as compared to the other Filipino OB Techs. Such an argument directly contradicts the existence of discriminatory animus, and while it may seem unfair to Plaintiff or suggest favoritism, such conduct is not actionable as discrimination.

Finally, Kapiolani presented substantial evidence

demonstrating that Plaintiff was not satisfactorily performing her OB Tech duties. Kapiolani provided some fifteen disciplinary notices, in addition to the events in question, in support of its position that Plaintiff had an extensive disciplinary record. The incidents of misconduct, and in particular Plaintiff's threats of violence against her co-workers, suggest unsatisfactory work performance.

Accordingly, Plaintiff's bald assertion that her "different" treatment raises an inference of discrimination, unaccompanied by any factual evidence of discrimination simply fails to raise a genuine issue of fact sufficient to preclude summary judgment. The Court therefore GRANTS summary judgment on this claim.

C. Discrimination Under the ADA

Plaintiff contends that she was terminated because of her disability in violation of the ADA. The ADA protects "qualified" individuals with "disabilities" against discrimination in the terms and conditions of their employment. To establish a prima facie case of disability discrimination, a plaintiff must show that: (a) she has a disability; (b) she is a qualified individual for the job in question; and (c) an adverse employment decision was made because of her disability. See 42 U.S.C. § 12112(a); see also Sanders v. Arneson Prods., Inc., 91 F.3d 1351, 1353 (9th Cir. 1996), cert. denied, 520 U.S. 1116 (1997).

The threshold issue in a plaintiff's prima facie case is a showing that she suffers from a disability protected by the statute. The statute defines "disability" as being: (a) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (b) a record of such an impairment; or (c) being regarded as having such an impairment. See 42 U.S.C. § 12102(c).

"Major life activities" include "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 C.F.R. § 1630.2(i).

As a threshold matter, the parties dispute whether Plaintiff is "disabled" within the meaning of the ADA. Plaintiff does not contend that she was disabled in fact while employed by Kapiolani but, rather, that Kapiolani perceived her as being disabled based on its condition that two psychiatrists or psychologists evaluate and clear her prior to returning to work. Further, Plaintiff states that she is receiving welfare benefits for disability, and is currently seeking social security disability benefits.

Kapiolani counters that the continued mental health treatment and/or work clearance were conditions of the leave of absence which were imposed in lieu of termination for Plaintiff's insubordination and threats of violence against co-workers, and do not demonstrate that Kapiolani regards Plaintiff as "disabled".

Based on these disputed facts, the issue of whether or not Plaintiff is or was perceived as disabled as required to maintain an ADA claim is not capable of being resolved on summary judgment. The analysis of the ADA claim, however, does not end there. Even assuming that Plaintiff can demonstrate the requisite showing that she is a qualified individual with a disability or was so perceived by Kapiolani, there has been no showing by Plaintiff that Kapiolani terminated her employment because of a disability or perception of the same, rather than her insubordination and threats of violence. Plaintiff has not come forward with any specific facts to establish pretext in order to avoid summary judgment. "[M]ere assertions that [an employer] had discriminatory motivation and intent . . . [is] inadequate,

without substantial factual evidence, to raise . . a genuine issue of material fact as to pretext in order to avoid summary judgment." Collings v. Longview Fibre Co., 63 F.3d 828, 833 (9th Cir. 1995) (quoting Steckl v. Motorola, Inc., 703 F.2d 392, 393 (9th Cir. 1983)) (alterations in original). Further, the ADA does not require employers to retain an individual who threatens harm to others:

> The [ADA] does not require an employer to retain a potentially violent employee. Such a requirement would place the employer on a razor's edge -- in jeopardy of violating the [ADA] if it fired such an employee, yet in jeopardy of being deemed negligent if it retained him and he hurt someone. The [ADA] protects only "qualified" employees, that is employees qualified to do the job for which they were hired; and threatening other employees disqualifies one.

Palmer v. Circuit Ct. of Cook County, Ill., 117 F. 3d 351, 353 (7th Cir. 1997) (citations omitted); cf. Den Hartog v. Wasatch Acad., 129 F.3d 1076, 1088 (10th Cir. 1997) (noting that the ADA provides the "direct threat" defense in which "an employer may define as a qualification for any job that 'an individual shall not pose a direct threat to the health or safety of . . . other individuals in the workplace") (quoting 4.2 U.S.C. § 12113(b) (1994)).

Plaintiff fails to establish pretext for the discharge from employment and, therefore, has not met her burden of asserting specific facts supporting the existence of a genuine issue for trial, and summary judgment on the ADA claim is GRANTED.

D. Retaliation Under Title VII

To make out a prima facie case of retaliation under Title VII, a plaintiff must show that: (a) she engaged in a protected activity; (b) her employer subjected her to an adverse employment action; and (c) a causal link exists between the protected activity and the adverse action. See Ray v. Henderson, 217 F.3d 1234, 1240 (9th Cir. 2000). If the plaintiff makes a prima facie retaliation claim under Title VII, the burden then shifts to the defendant to articulate a legitimate nondiscriminatory reason for its decision. See Id. Once the defendant articulates a legitimate nondiscriminatory reason for the adverse employment action, the plaintiff bears the ultimate burden of demonstrating that the reason stated is merely a pretext for a discriminatory motive on the behalf of the employer. See id.

Plaintiff alleges retaliation based on her complaint to the Union[1], and her filing of a discrimination charge with the

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[1] The parties disagree as to whether Plaintiff's retaliation claim, with regards to her complaint to the Union, encompasses "concerted union activity." Kapiolani argues that Plaintiff's retaliation claim based on her prior filing of a "class action" union grievance is clearly preempted under San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959) , because it is "concerted activity" under section 7 of the NLRA. In Garmon, the Supreme Court held that conduct which was actually or arguably protected or prohibited by the NLRA could be addressed, if at all, only by the NLRA and not by a court. See 359 U.S. at 245 ("When an activity is arguably subject to Section 7 or Section 8 of the [NLRA], the States as well as the federal courts must defer to the exclusive competence of the [NLRB] .")

Plaintiff objects to this characterization of her retaliation claim, and argues that the alleged "prior union activities" were premised upon Plaintiff and the other OB Techs being Filipinos. Accordingly, Plaintiff argues the claim is for

HCRC. Making a complaint to one's union, as well as filing a civil rights commission claim, are protected activities under Title VII. See id. It is undisputed that Plaintiff has suffered an adverse employment action, as she has been terminated from her job. The dispute in this case, therefore, concerns the causal link between Plaintiff's protected activity and her termination.

Kapiolani states unequivocally that Plaintiff's "forced" leave of absence and ultimate termination were a result of Plaintiff's misconduct and threats in violation of Kapiolani's House Rules. Plaintiff offers no evidence to contradict Kapiolani's stated reasons for her termination. Additionally, Kapiolani claims that although Plaintiff's termination was not effectuated until July 1999, the decision to terminate Plaintiff was made much earlier -- prior to Plaintiff's filing of her first HCRC charge. That the "adverse action" was not "subsequent" to plaintiff's protected activity of filing the HCRC claim is significant. Further, Plaintiff fails to establish any temporal connection between her complaints and/or filings and her actual termination. Her grievance was reported to the Union in May of 1998, and her HCRC claim was filed in February of 1999. Plaintiff was not, however, actually terminated until July 1999 -- approximately six months after the last filing.

Plaintiff's mere allegations are not persuasive evidence of a potential causal link. Plaintiff has not met, therefore, her

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charging national origin discrimination not for "concerted union activity," and is therefore not preempted under the Garmon doctrine.

While the viability of Plaintiff's argument is questionable, for argument's sake, Plaintiff's complaint to her Union is treated as a protected activity and the merits of her retaliation claim are accordingly addressed.

burden of asserting specific facts supporting the existence of a genuine issue for trial., and summary judgment on this claim is GRANTED .

E. Section 301 Preemption of State Law Claims

Plaintiff brings her IIED and NIED claims under state law, and does not raise any claims under section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. 185. Plaintiff's IIED and NIED claims require interpretation of the CBA between the Union and Kapiolani, and are therefore preempted by § 301 of the LMRA.

In enacting section 301 of the LMRA, Congress intended to ensure that collective bargaining agreements are interpreted uniformly. See, e.g., Lingle v. Norge Div. Of Magic Chef, Inc., 486 U.S. 399, 404 & n.3 (1988); Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 209-10 (1985); Milne Employees Ass'n. v. Sun Carriers. Inc., 960 F.2d 1401, 1407-08 (9th Cir. 199.2), cert. denied, 508 U.S. 959 (1993). The preemptive effect of section 301 is well established. To determine whether a state law claim is completely preempted under section 301, the relevant inquiry is whether resolution of the claim requires the interpretation of a collective bargaining agreement. See Lingle, 486 U.S. at 413 ("[I]f the resolution of a state-law claim depends upon the meaning of a collective bargaining agreement, the application of state law . . . is pre-empted and federal labor-law principles -- necessarily uniform throughout the nation -- must be employed to resolve the dispute."); See also Ackerman v. Western Elec. Co., Inc., 860 F.2d 1514, 1517 (9th Cir. 1988) (holding that state law claim is not preempted if "the state law factual inquiry [does] not turn on the meaning of any provision of the collective bargaining agreement").

Here, Plaintiff's emotional distress claims arise, at least, out of the joint meeting where Plaintiff was given the choice of a "forced" leave or termination, an allegedly deficient investigative process, and her ultimate termination. Claims for intentional/negligent infliction of emotional distress are frequently preempted by section 301. See, e.g., Cook v. Lindsay Olive Growers, 911 F.2d 233, 239-40 (9th Cir. 1990) ; Harris v. Alumax Mill Prods., Inc., 897 F.2d 400, 403 (9th Cir.), cert. denied, 498 U.S. .835 (1990); Hyles v. Mensing, 849 F.2d 1213, 1216-17 (9th Cir. 1988) . "[S]tate tort claims for intentional [and negligent] infliction of emotional distress are preempted when they arise out of the employee's discharge or the conduct of the defendants in the investigatory proceedings leading up to the discharge." Scott v. Machinists Auto. Trades Dist. Lodge No. 190 of N. Cal., 827 F.2d 589, 594 (9th Cir. 1987); see also Stallcop v.Kaiser Found. Hosp., 820 F.2d 1044, 1049 (9th Cir. 1987).

Kapiolani's policies concerning investigation of misconduct and/or complaints about the same, and any resultant discipline are covered by the CBA. Similarly, the CBA sets the standards and procedures for discharge decisions. Insofar as Plaintiff's emotional distress claims against Kapiolani arise from her discharge, the conduct of Kapiolani in the investigatory proceedings, and the imposition of disciplinary action, including "forced" leave, resolution of her claims will require interpretation of the CBA.. Because Plaintiff's emotional distress claims cannot be evaluated independently from the CBA, and in fact substantially depend on interpretation of the terms of the same, they are preempted by section 301, see Lingle, 486 U.S. at 413., and summary judgment is GRANTED on this claim.

F. Right to Privacy Violation

Finally, Plaintiff asserts that her right to privacy under Article I, section 6 of the Hawaii Constitution was violated by Kapiolani when it relied upon the following: 1) Plaintiff's prior arrest for terroristic threatening; and 2) psychiatric reports of Plaintiff, in deciding to terminate Plaintiff.

As Kapiolani points out, Plaintiff's constitutional law violation fails as a preliminary matter because her claim fails to demonstrate state action. See George v. Pacific-CSC Work Furlough, 91 F.3d 1227, 1229 (9th Cir. 1996) (per curiam) ("Individuals bringing actions against private parties for infringement of their constitutional rights . . . must show that the private parties' infringement somehow constitutes state action.") (citation omitted), cert. denied, 519 U.S. 1081 (1997); Duffield v. Roberston Stephens & Co., 144 F.3d 1182, 1200 (9th Cir.) ("A threshold requirement of any constitutional claim is the presence of state action."), cert. denied, 525 U.S. 982 (1998) .

Consequently, summary judgment is GRANTED as to this claim as well.

CONCLUSION

Based on the foregoing, the Court DENIES Plaintiff's Motion for Trial by Jury. Further, the Court GRANTS Kapiolani's Motion for Summary Judgment in its entirety.

DATED: Honolulu, Hawaii; 4/3/01.

LESLIE E. KOBAYASHI
UNITED STATES
MAGISTRATE JUDGE

II. Judgment in a Civil Case, Civil Nos. 99-00635 LEK and 00-00293 LEK, filed April 5, 2001 (U.S. District Court for the District of Hawaii)

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

SHIRLEY PICO UNTALAN,	)	CV. NO. 99-00635 LEK
	)	CV. NO. 00-00293 LEK
Plaintiff,	)	
vs.	)	
	)	
KAPIOLANI MEDICAL CENTER,	)	
	)	
	)	*FILED APRIL 5, 2001*
Defendant.	)	
	)	

Decision by Court. This action came for hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the Defendant's Motion for Summary Judgment is GRANTED, pursuant to "Order Denying Plaintiff's Motion for Trial by Jury; and Order Granting Defendant's Motion for Summary Judgment" filed on April 4, 2001.

April 5, 2001

WALTER A.Y.H. CHINN
CLERK

III. Memorandum, Case No. 01-15738, filed May 5, 2003 (U.S. Court of Appeals for the Ninth Circuit)

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SHIRLEY PICO UNTALAN,	)	No. 01-15738
	)	D.C. Nos.
Plaintiff-Appellant,	)	CV. NO. 99-00635 LEK
	)	CV. NO. 00-00293 LEK
vs.	)	
	)	
KAPIOLANI MEDICAL CENTER,	)	MEMORANDUM *
	)	*FILED JUNE 13, 2003*
Defendant-Appellee,	)	
	)	

Appeal from the United States District Court
for the District of Hawaii
Leslie E. Kobayashi, Magistrate Judge, Presiding
Argued and Submitted May 5, 2003
Honolulu, Hawaii

Before: GOODWIN, RYMER, and T.G. NELSON, Circuit Judges.

Shirley Pico Untalan appeals the district court's'[1] denial of her request for a jury trial, and its grant of summary judgment in favor of her former employer, Kapiolani Medical

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as

[1] The parties consented to proceed before a magistrate judge. For convenience, we refer to the magistrate judge as the district court.

provided by Ninth Circuit Rule 36-3.
Medical Center ("Kapiolani"). We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

Because the facts are known to the parties, we do not recite them here. The district court properly denied Untalan's untimely demand for a jury trial.[1] Untalan waived her right to a jury trial when she failed to make her demand within "10 days after the service of the last pleading directed to such issues."[2] Thereafter, it is within the district court's discretion to grant Untalan a jury trial.[3] However, where, as here, the district court correctly concluded that it was "mere inadvertence" that explained why Untalan had not made an earlier request, the district court lacked discretion. to grant a jury trial.[4] Indeed, Untalan's counsel attempted to excuse the delay by saying he had been busy with settlement negotiations and discovery and that he had been out of town for two weeks. His excuses do not justify the delay. Accordingly, we hold that the district court properly denied Untalan's untimely request for a jury trial.

The district court also properly granted summary

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[1] We review a district court's decision to deny a jury trial for abuse of discretion. *Kulas v. Flares, 255* F.3d 780, 783 (9th Cir. 2001), *cert. denied, 535* U.S. *995* (2002).

[2] FED. R. CIV. P. 38(b),(d).

[3] FED. R. CIV. P. 39(b) ("[T]he court in its *discretion* . . .

may order a trial by a jury . . . .") (emphasis. added).

[4] *Craig v. Atlantic Richfield Co.,* 19 F.3d 472, 477 (9th Cir. 1994) (holding that "oversight, inadvertence, [or] inexcusable neglect" cannot be grounds for a district court using its discretion to grant a jury trial) (internal quotation marks omitted).

judgment in favor of Kapiolani as to Untalan's Title VII[1] employment discrimination claims.[2] Untalan failed to make out a prima facie case that her employer intentionally discriminated against her because she is Filipino.[3] She offered no evidence that Kapiolani treated persons of different national origins differently than Kapiolani treated her. Likewise, she offered no evidence that Kapiolani discriminated. against other Filipinos either. On the contrary, the record shows that Kapiolani terminated Untalan because she was insubordinate. Therefore, we hold the district court properly granted summary judgment for Untalan's Title VII discrimination claim.

Untalan also asserted a discrimination claim under the Americans with Disabilities Act ("ADA"). Untalan failed to make a prima facie showing that Kapiolani terminated her because of a perceived disability.[4] Untalan originally accepted but ultimately failed to comply with her conditional six-month suspension. She provided no evidence that Kapiolani would have refused to take her back had she complied with her conditional suspension. Thus, the record shows that Kapiolani terminated Untalan because she failed to comply with her suspension terms, rather than because it perceived her as disabled. Therefore, we hold that the district court properly granted summary judgment as to Untalan's ADA claim.

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[1] 42 U.S.C. 2000e-2(a)(1).

[2] We review grants of summary judgment de novo. *Oliver v. Keller*, 289 F.3d 623, 626 (9th Cir. 2002).

[3] *Sischo-Nownejad v. Merced Cmty. Coll. Dist.*, 934 F.2d 1104, 1109 (9th Cir. 1991) (requiring a showing of intentional employer discrimination).

[4] 42 U.S.C. § 12102(2)(C) (defining disability as "being regarded as having such an impairment").

Untalan's retaliation claim fails to survive summary judgment as well. She offers: no causal link between her union complaints and her termination.[1] Rather, Kapiolani provided uncontroversial evidence that it terminated Untalan because of her misconduct and violent threats. Thus, we hold that summary judgment was proper as to Untalan's retaliation claim also.

Untalan's state law claims fail on the merits. Nothing that happened to Untalan on November 27, 1998 (or thereafter) was unreasonable or outrageous for purposes of the intentional infliction of emotional distress ("IIED") claim.[2] Furthermore, she does not make any showing of a predicate physical injury as Hawaii law requires for negligent infliction of emotional distress ("NIED").[3] Therefore, we hold that the district court properly granted summary judgment as to Untalan's IIED and NIED claims.

Finally, Untalan's privacy claim, cannot survive summary judgment. She stipulated that her claim was based on Article I, Section 6 of the Hawaii constitution. However, her claim fails to demonstrate state action, as required for state constitutional claims.[4] Accordingly, we hold that the

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[1] *Ray v. Henderson*, 217 F.3d 1234, 1240 (9th Cir. 2000) (requiring a causal link between a protected activity and an adverse action to prove a prima facie case of retaliation under Title VII).

[2] *Dunlea v. Dappen*, 924 P.2d 196, 206 (Haw. 1996).

[3] *Doe Parents No. 1 v. State Dep't of Ed., 58* P.3d *545,* 580-82 (Haw. 2002) (excepting from the physical injury requirement a limited set of circumstances that are not present here).

[4] *George v. Pacific-CSC Work Furlough,* 91 F.3d. 1227, 1229 (9th Cir. 1996) (per curiam) ("Individuals bringing

district court appropriately granted summary judgment.

The parties' requests for attorney fees and costs are denied. For the reasons. stated above, we affirm the district court.

AFFIRMED.

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actions against private parties for infringement of their constitutional rights . . . must show that the private parties' infringement somehow constitutes state action.").